PP v. HARKIRATH SINGH HARBANS SINGH

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID J
[CRIMINAL APPEAL NO: PA-41H-17-11-2021]
9 NOVEMBER 2022

Abstract – *The court will always take an abhorrent view of any offence under s. 509 of the Penal Code that results in injury to the dignity, character and reputation of a woman's natural state, more so, when the offence is committed in an environment where she is supposed to feel safe and secure. It follows that to impose a non-conviction discharge order under s. 173A(2) of the Criminal Procedure Code on a mentally disordered male doctor for secretly video-recording female medical officers in a bathroom in their natural state, as the Magistrate herein did, was patently incorrect in law; the rehabilitative approach must be balanced with a deterrent approach in the form of a conviction under each charge.*

CRIMINAL LAW: *Penal Code – Section 509 – Intruding upon privacy of a person – Mentally disordered male doctor – Secretly video-recording female medical officers in bathroom in their natural state – Plea of guilty – Sentence – Bond of good behaviour under s. 173A(2) of Criminal Procedure Code – Whether appropriate and adequate*

The respondent, a medical officer attached to the Penang General Hospital ('Hospital') and who was confirmed to have suffered from a mental disorder known as 'Voyeuristic Disorder', had hid a camera device in the staff bathroom used by on-call medical officers at the Hospital. The hidden camera having been discovered and found to have contained video recordings of two female medical officers in their natural state, the respondent was arrested and charged with two counts of offences under s. 509 of the Penal Code for having intruded into the privacy of the said female medical officers. The respondent pleaded guilty to the charges, and on account of his mental disorder, mitigated for the court to order a discharge and to bind him over to be of good behaviour under s. 294 of the Criminal Procedure Code ('CPC'). It was not in dispute that a discharge under s. 294 of the CPC carried with it a recorded conviction, as opposed to a similar order under s. 173 CPC which carried no such conviction. Despite the respondent's plea, the Magistrate, upon consideration of the relevant factors, including the four medical reports on the respondent, decided however to invoke the more lenient order under s. 173A(2) of the CPC, and imposed an order of discharge on a bond of good behaviour for two years on each of the charges under the said section. Dissatisfied, the prosecution appealed and argued that the

A decision of the Magistrate was incorrect in law, not least for failing to adequately address public interest and the severity of the offence. The respondent retorted that public interest would best be served by not recording any criminal conviction against him, and in any case by allowing him to undergo treatment outside the confines of a prison.

B **Held (ordering respondent to post a bond of good behaviour under s. 294 CPC):**

(1) The court registers a strong objection to offences involving the intrusion of privacy of women and takes an abhorrent view to any offence that results in the injury to the dignity, character and reputation of a woman's natural state in an environment where she is supposed to feel safe and secure. (paras 16 & 17)

(2) The Magistrate, in imposing an order under s. 173A(2) CPC, had failed to address the question of the severity of the offence. In assessing the gravity of the offence, the question of the respondent's ability to self-control is relevant and must be considered. As the learned judge in *PP v. Chong Hou En* said "if the nature of the mental disorder is such that the individual retains substantially the mental ability or capacity to control or refrain himself when he commits the criminal acts but instead chooses not to exercise his self-control, the court will attribute very little or no mitigating value to the presence of the mental disorder." (paras 21 & 22)

(3) The medical reports on the respondent, other than reporting what the respondent conveyed regarding his difficulty in resisting his urges and compulsion for voyeurism, did not express any opinion whether the mental disorder had impaired his ability to exercise self-control when the offences were committed. This aside, the facts also showed that in secretly placing the camera device inside a tissue box in the bathroom in question, there was deliberation, planning and purposeful execution of the respondent's intention. The respondent knew that the bathroom would be used by women and that the device would in most likelihood record women in their natural state. The respondent's action, hence, could not be said to be arising from a sudden temptation or as a result of a sudden uncontrollable impulse. All this constituted sufficient aggravating factors that required a revision of the Magistrate's decision. (paras 24-28 & 30-31)

(4) The order of the Magistrate is set aside and substituted with an order that the respondent is released on probation of good behaviour under s. 294 CPC for each of the charges for a period of two years subject to the execution of a bond in the sum of RM5,000 with one surety, provided that, any default hereof shall cause the respondent to be sentenced accordingly as originally provided under s. 509 of the Penal Code. (para 34)

Case(s) referred to:
Goh Lee Yin v. PP [2005] SGHC 226 ***(refd)***
Jumari Mohamed v. PP [1981] 1 LNS 163 ***(refd)***
Mohd Fairuz Ahmad v. PP [2021] 1 LNS 2074 HC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Muhammad Ridoan & Anor v. PP [2013] 5 CLJ 904 HC ***(refd)***
PP v. Chong Hou En [2015] SGHC 69 ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohamad Ramly [1973] 1 LNS 120 HC ***(refd)***
PP v. Muhammad Fiqry Jafri & Anor [2021] 4 CLJ 552 HC ***(refd)***
PP v. Nor Hanizam Mohd Noor [2019] 1 LNS 944 HC ***(refd)***
R v. Carton [2012] EWCA Crim 3199 ***(refd)***
R v. Heath (Nikolas) [2017] EWCA Crim 2502 ***(refd)***
R v. P [2004] All ER (D) 31 ***(refd)***
R v. Tinsley [2003] EWCA Crim 3032 ***(refd)***
Re Badri Abas [1970] 1 LNS 133 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173A(2), 294
Penal Code, ss. 51A, 52A, 509

Probation of Offenders Act 1951 [Sing], s. 5(4)

For the appellant - Preeya Darrsini Sugumaran; DPPs
For the respondent - T Tharumarajah; M/s T Tharuma & Assocs

Reported by Wan Sharif Ahmad

JUDGMENT

Mohd Radzi Abdul Hamid J:

Introduction

[1] This an appeal by the prosecution ('appellant') against the decision of the Magistrate's Court in exercising its discretion under s. 173A(2) of the Criminal Procedure Code ('CPC') to discharge the respondent of two offences under s. 509 of the Penal Code ('PC') instead of convicting and sentencing him with a punishment provided under that law which is imprisonment up to five years or fine or both ('appeal').

The Charge

[2] The two charges ("charges") are as follows:

First Charge

Bahawa kamu pada 9 Jun 2020 jam lebih kurang 6.00 petang bertempat di bilik mandi No. 02-GF-188 dalam Bilik Pegawai Perubatan Atas Panggilan Wad Unit Rawatan Rapi Pediatrik (PICU) Hospital Pulau Pinang di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah mengaibkan kehormatan seorang wanita Ooi Lee Ying (K/P: 880220-02-5364) dengan cara merakam video penama berkenaan semasa di dalam

bilik mandi tersebut yang akan mengganggu kesantunan Ooi Lee Ying (K/P: 880220-02-5364). Oleh itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 509 Kanun Keseksaan.

Hukuman:

Dihukum dengan pemenjaraan selama tempoh yang boleh sampai 5 tahun, atau dengan denda, atau dengan kedua-duanya.

Second Charge

Bahawa kamu pada 9 Jun 2020 jam lebih kurang 6.30 petang bertempat di bilik mandi No. 02-GF-188 dalam Bilik Pegawai Perubatan Atas Panggilan Wad Unit Rawatan Rapi Pediatrik (PICU) Hospital Pulau Pinang di dalam Daerah Timur Laut, Di Dalam Negeri Pulau Pinang, telah mengaibkan kehormatan seorang wanita Vilasini A/P Gunasegaran (K/P: 900905-025434). Oleh itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 509, Kanun Keseksaan.

Hukuman:

Dihukum dengan pemenjaraan selama tempoh yang boleh sampai 5 tahun, atau dengan denda, atau dengan kedua-duanya.

Background Facts

[3] The respondent was charged for two offences under s. 509 of the Penal Code for having intruded the privacy of two women. The respondent had placed a hidden video camera device inside a tissue box in a staff bathroom used by on-call medical officers at the Penang General Hospital including female officers. The camera was discovered by one of the victims and an inspection of the camera revealed that there were video recordings of each of the victims in their natural state. As fate would have it, in the process of setting up and hiding the camera in the bathroom, the respondent had inadvertently and unknowingly recorded an image of himself. That led to his arrest and eventually his prosecution.

[4] Following a representation made by the respondent's counsel to the Attorney General's Chambers, the appellant accepted the respondent's offer to plead guilty. The offer to plead guilty to the charges was primarily premised on a mental disorder stated to be suffered by the respondent. That disorder was identified as "Voyeuristic Disorder".

[5] After the respondent pleaded guilty to the charges, counsel for the respondent tendered four medical and specialist reports to prove the medical condition suffered by the respondent as the main mitigating factor in sentencing. Those medical and specialist reports were not challenged by the appellant.

[6] The appellant then endeavoured to move the Magistrate to make an order for a bond of good behaviour after a conviction is recorded against the respondent for all the offences, thus attracting the application of s. 294 of the CPC. The respondent's counsel however sought to persuade the Magistrate to exercise her discretion pursuant to s. 173A(2) of the CPC in favour of discharging the respondent without recording a conviction.

[7] In her grounds of judgment, the Magistrate held that whilst she acknowledged that the appellant had agreed to the offer of plea of guilty subject to a conviction and bond of good behaviour pursuant to s. 294 of the CPC, the power to pass sentence only rested with her as the trial judge after consideration of arguments on the aggravating and mitigating factors.

[8] After hearing submissions from the respective parties the Magistrate preferred to exercise her discretion in favouring the respondent with an order for discharge under s. 173A(2) of the CPC conditional upon a bond of good behaviour instead of recording a conviction first under s. 294 of the CPC. The respondent was ordered to place a bond of RM2,500 with one surety under each of the charge.

Grounds Of Magistrate's Decision

[9] In arriving at her decision, the Magistrate expressed the view that whilst she agreed that the respondent's actions violated a woman's dignity and was against the moral value of society, the offence was not a serious offence by definition under s. 52A of the PC. Additionally, the Magistrate found that there were strong mitigating factors in favour of the respondent. These factors were: (i) the mental disorder suffered by the respondent; (ii) that the respondent is not a danger to society; (iii) the respondent's remorse; (iv) the effect of a conviction on his career; (v) the respondent is first offender; (vi) the respondent's treatment and chances of recovery; (vii) the embarrassment already suffered by the respondent and his family following his plea of guilty; and (viii) that a bond of good behaviour is a suspended sentence and if the respondent failed to comply with his bond he will be liable to be sentenced to the original sentence.

Issues In This Appeal

[10] The issue in this appeal is fairly straightforward. This court has to determine whether the order of discharge by the Magistrate pursuant to s. 173A(2) of the CPC was correct in law and appropriate having regard to the nature of the offences under s. 509 of the PC.

Arguments By Parties

For The Appellant

[11] Essentially, learned Deputy Public Prosecutor submitted that the nature of the offences was offensive to society, in particular to women such as the victims. They suffered the indignity and shame of having been

recorded in their natural state without their knowledge and consent. They were mentally and emotionally traumatised. For those reasons the Magistrate had failed to adequately address the factors of severity of the offence and public interest. That the respondent had pleaded guilty and suffered from a certain mental disorder did not amount to sufficient grounds for not convicting the respondent.

[12] In support of her arguments, learned Deputy Public Prosecutor referred to, *inter alia*, the following decisions: *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256; *Jumari Mohamed v. PP* [1981] 1 LNS 163; *Mohd Fairuz Ahmad v. PP* [2021] 1 LNS 2074; [2021] MLJU 2453; *PP v. Nor Hanizam Mohd Noor* [2019] 1 LNS 944; [2019] MLJU 638 and *Muhammad Ridoan & Anor v. PP* [2013] 5 CLJ 904.

For The Respondent

[13] In summary, it was contended for the respondent that having regard to the career of the respondent as a doctor, the Magistrate's order to discharge him was just and appropriate since the respondent was a first offender. It was therefore important to give the respondent opportunity to carry on with his career without any stigma of a criminal record following him. It was further contended that since the prosecution did not challenge the medical and specialist reports when they were tendered as evidence of the respondent's medical condition, then the respondent must be given the chance to continue with his treatment. Sentencing him to jail would interfere with that treatment and may diminish any chance the respondent would have in recovering from that mental disorder and leading a normal life. The embarrassment suffered by the respondent and his family was punishment enough and served to remind him to not repeat the offences. On the matter of public interest, it was argued that public interest would be better served by allowing the respondent to be treated outside the confines of a prison more so when the treatments have shown positive results.

[14] In support of his arguments learned counsel referred, *inter alia*, to the following cases: *R v. Carton* [2012] EWCA Crim 3199; *R v. Heath (Nikolas)* [2017] EWCA Crim 2502; *R v. Tinsley* [2003] EWCA Crim 3032; *R v. P* [2004] All ER (D) 31; *Goh Lee Yin v. PP* [2005] SGHC 226 and *PP v. Muhammad Fiqry Jafri & Anor* [2021] 4 CLJ 552; [2021] 9 MLJ 915.

The Law Relating To Appeals

[15] In *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875, Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

Deliberations By This Court

[16] It must be noted that in pursuing this appeal, the appellant did not push for a substitution of the order for a bond of good behaviour with a jail sentence on the respondent. The appellant accepted that the respondent suffers from "Voyeuristic Disorder" and recognised that the respondent requires continued specialist treatment and that the respondent's interest would be better served if the respondent continues to receive treatment outside the confines of a prison environment.

[17] Now, this court wishes to firstly reiterate its strong objection to offences involving the intrusion of privacy of women as decided by this court in *PP v. Nor Hanizam Mohd Nor* (*supra*). This court remains abhorrent to any offence that results in the injury to the dignity, character and reputation of any woman more so when the offence involves the secret recording of a woman's natural state in an environment where she is supposed to feel safe and secure. Having stated that, this court must however recognise that human conduct may be influenced by some mental disorder that may impair one's capacity to maintain normalcy within a society's normal and accepted standards of morality and decency.

[18] With regards to the English decisions in *R v. Carton, R v. Heath* (*Nikolas*), *R v. Tinsley* and *R v. P* (*supra*) referred to by learned counsel for the respondent, this court observed that in all those cases the issue that arose for

A determination by the appeal courts was on the appropriateness of sentence passed by the trial courts and not whether a conviction should have been recorded against the accused. In all those cases, a conviction was recorded against the accused. Therefore, whilst those cases may be relevant on the issue whether a court should afford an accused suffering from a mental B disorder the opportunity to receive treatment absent of incarceration, they do not assist in supporting the respondent's case that no conviction should be recorded against the respondent.

[19] In the Singapore case of *Goh Li Yin* (*supra*), the accused was in fact convicted of the offence. Again, the issue there was on the appropriateness C of the sentence. Due to the provisions of the Singapore Probation of Offenders Act 1951, although the conviction remained on the record of the proceedings the conviction was deemed to not be a conviction for as long as the accused complied with the terms of the probation. If the accused breach those terms then under s. 5(4) of the same Act, the accused was liable to be D sentenced for the original offence. That in effect equates to the provisions of s. 294 of our CPC, save for the deeming provisions found in the Act. Similarly, that case does not assist the respondent in contending that a conviction should not be recorded against the respondent.

[20] In this court's view, a more relevant Singapore decision to refer to, E unlike in *Goh Lee Yin* which dealt with an accused suffering from kleptomania, would be *PP v. Chong Hou En* [2015] SGHC 69 which dealt with an accused who also suffered from a voyeuristic disorder. In that case, the High Court had the benefit of considering two opposing expert opinions on the mental disorder and this court finds the deliberations there very F instructive for the purposes of this Appeal. Again the issue there was on the appropriateness of sentence and not on conviction. His Lordship Chan Seng Onn J undertook a careful deliberation of the aggravating and mitigating factors and finally came to a decision that the sentence of 30 months' probation meted by the District Court Judge was inadequate and instead an G imprisonment term of 12 weeks was imposed. The particular relevance of that decision to this appeal will be shortly later.

[21] Now returning to the factors considered by the Magistrate, this court is of the view that whilst she correctly acknowledged that the offence violated a woman's dignity and was against society's accepted standards of morality, H she had failed to address the question of the severity of the offence. As an example, embracing a woman in public who is a complete stranger is equally offensive to a woman's dignity as much as recording her secretly in her natural state. But the former is obviously less serious than the latter. The seriousness or gravity of an offence is therefore relevant in deciding on the I appropriate sentence in a case such as in this appeal. That seriousness is determined by taking into account: (i) the degree of spontaneity; (ii) the risk

of permanence of any recording; (iii) the use of ubiquitous device; (iv) risk of dissemination of the recording; (v) the degree of the victim's physical exposure; (vi) the risk of potential additional victims for as long as the device remained operative; and (vii) the degree of injury to the woman's dignity and reputation.

[22] Returning to the decision in *Chong Hou En* (*supra*), in evaluating the aggravating and mitigating factors and the applicable principles of sentencing, the court there had deliberated on the question whether the accused's mental disorder had deprived him of self-control and based on the expert opinion in that case, there was no such evidence. After reading His Lordship Chan Seng Onn J's approach to the issue, this court is persuaded to agree that the question of the respondent's ability to self-control in this appeal is equally relevant in assessing the gravity of the offence and the applicable principles of sentencing. To quote:

> [25] Given that the presence of a diagnosis of a mental disorder is in most cases a mitigating factor which the court may take into account when sentencing the offender, its significance in terms of mitigating value depends on the factors and principles enumerated above. These include specifically factors such as the causal link, the nature and severity of the mental disorder and the offender's ability to make conscious choices and to appreciate the nature and quality of his actions. As explained at length, these are particularly important when determining the appropriate sentencing principles which should be engaged in the sentencing exercise.
>
> [26] In fact, the court must pay particular attention to the nature of the mental disorder when the disorder is one which invariably manifests itself in the doing of the very act which is criminalised. If the very diagnostic criteria include the invariable manifestation of an act which is criminalised, a causal link, however tenuous, would almost certainly be present. It may even be circular to speak of causation, simply on that premise – the diagnosis is based on the acting out of the criminal behaviour while the criminal behaviour is explicable by the presence of the mental disorder. The Prosecution ably demonstrates the difficulty in such cases since it would mean the more a person engaged in the criminal behaviour, the more serious the disorder is and the greater the mitigating value the disorder carries. This cannot be correct.
>
> [27] Therefore, in this particular genus of mental disorders, the concept of a causal link may not be particularly useful, or even that relevant for determining the mitigating value to be ascribed to the mental disorder. In my view, where the "severity" of the mental disorder in an individual is assessed with respect to the "frequency" of the criminal act and there is a positive correlation between the "severity" and the "frequency", then the severity and nature of the individual's mental disorder ought not to be regarded as a mitigating factor without first examining in detail the nature of the mental disorder, in terms of how it has affected the

A individual's ability or capacity to control or refrain himself from committing the criminal acts and whether punishment will be able to instil fear in him and deter him from committing the same criminal acts in future.

[28] If the nature of the mental disorder is such that the individual retains
B substantially the mental ability or capacity to control or refrain himself when he commits the criminal acts but he instead chooses not to exercise his self-control, and if it is also shown that punishment will be effective in instilling fear in him and thereby deter him from committing the same criminal acts in the future, I will attribute very little or no mitigating value to the presence of the mental disorder.

C [29] If there is evidence to show that the individual is not able or is substantially not able to control or refrain himself from committing the criminal acts because of the mental disorder and similarly, punishment is unlikely to be effective in instilling fear in him and to deter him from committing the same criminal acts in future because of the mental
D disorder, then the principle of deterrence may be given less weight and rehabilitation may well take precedence provided that the treatment mandated as part of his rehabilitation is going to be effective in treating the mental disorder and in reducing the risk of recidivism. Nevertheless, if the criminal offences committed are just too serious in nature, the principle of rehabilitation may well have to give way to the principle of
E retribution and protection of the public at large. Ultimately, the factual circumstances will govern how all these different factors, pulling in different directions, are going to interact. The court must judiciously weigh these various factors and arrive at a fair and just sentence that is appropriate in all the circumstances of the case.

F **[23]** This court undertook a close reading of the medical and specialist reports as found in vol. 3 of the record of appeal and found:

(i) in Dr Lee Dan Huey's medical report dated 14 July 2020 (p. 28 of vol. 3 record of appeal) it was stated that the respondent revealed that he was trying hard to resist urges to snap photos;

G (ii) in Dr Emmanuel Joseph Pereira's report dated 19 February 2021 (p. 35 of vol. 3 record of appeal) it was stated at para. 9.2 the respondent suffers from the urge to take video recordings or photograph. At para. 9.6.3 the doctor made a general statement about men who struggle with the compulsion but makes no specific reference to the respondent.
H Earlier at part 8 of the same report Dr Emmanuel observed that the respondent's mood was normal most of the time but on occasions felt anxious;

(iii) in Dr Lynn Yong Ee Lin's medical report dated 13 January 2021 (p. 36 of vol record of appeal) it was stated that the respondent had reported
I that the compulsion for voyeurism can be overwhelming at times but she did form any opinion on the matter; and

(iv) in her report dated 25 March 2021 (p. 38 vol 3 record of appeal) Dr Lynn did not express any opinion on the matter of compulsion or self-control but stated that the respondent had shown commitment towards change.

[24] In this court's view, those reports did not express any opinion on whether the respondent's mental disorder had impaired the respondent's ability to exercise self-control when the offences were committed. It is not evident to this court that there is any expert opinion on such impairment other than just reporting what the respondent conveyed regarding his difficulty in resisting urges and his compulsion for voyeurism. Whether the compulsion was so overwhelming that the respondent lost the ability to control himself when he went to the General Hospital to secretly place the camera inside the tissue box in the staff bathroom is not evident to this court (see p. 3 of Dr Emmanuel's report).

[25] After considering the facts in this appeal, this court finds that there was deliberation, planning and purposeful execution of the respondent's intention to secretly place a camera device inside a tissue box in the 02-GF-N bathroom. The respondent knew that the bathroom will be used by women and he knew that the device will in most likelihood record women in their natural state since the respondent was also a doctor in the same hospital.

[26] Notwithstanding the respondent's remorse, guilt and embarrassment over the matter, the respondent's actions cannot be said to be a sudden temptation, a result of a sudden uncontrollable impulse or sheer thoughtlessness as stated by Sharma J in *Re Badri Abas* [1970] 1 LNS 133; [1971] 1 MLJ 202. He bought the device knowing its use and then eventually used it to fulfil his voyeuristic desires. The effort the respondent took to go the bathroom, select a place to hide the device and put it into operation involved conscious and deliberate decisions and execution that happened over some span of time. It was not carried out and completed instantaneously at the spur of the moment like taking up skirt photos.

[27] Notwithstanding that the presence of the device was discovered by one of the victims thereby removing the potential recording of any other women and the dissemination of its contents whether intentionally or otherwise, yet those risks were real for if the device was not discovered and remained hidden until retrieved by the respondent the contents would have been preserved and subjected to repeated viewing.

[28] The facts therefore show sufficient aggravating factors that requires a revision of the Magistrate's decision. The fact that the offence does not come within the meaning of serious offence under s. 51A of the PC does not disqualify the offence from being treated as serious in terms of its moral reprehensibility. Whilst this court does not dispute that the respondent's

mental condition is recognised medically as a disorder and that condition amounts to an extenuating circumstance, this court cannot agree that all other factors considered by the Magistrate necessarily deserve consideration in the respondent's favour. The risk of embarrassment, injury to reputation, risk to a career and destruction of family relationships are matters that should have been considered before the respondent acted on his urges, not after. More than often such factors are brought up in mitigation only to stir sympathy.

[29] Having said that however, this court agrees with learned counsel for the respondent that the respondent's treatment, his commitment to treatment and his progress serves as sufficient reason for this court to not substitute the Magistrate's order with one of custodial sentence. The fact that the appellant had not pressed for such sentence before the Magistrate and the same position was taken at the hearing of this appeal shows that the appellant supports the need of the respondent to be rehabilitated. In that respect the interest of the appellant has been sufficiently addressed.

[30] But the matter does not end there. The interest of the public especially the victims, must also be addressed. By granting an order under s. 173A(2) of the CPC, the courts will be seen as taking a soft and lenient stance on such offences. This kind of offence is not one that merely involves a technical offence or misuse of funds but is an offence against accepted norms of conduct and morality of society with regards to the dignity and respect of women. This court will be adding to the shame, emotional and mental injury already suffered by the victim by failing to act judiciously in accordance with the law.

[31] Guided by the decisions in *Re Badri Abas* [1970] 1 LNS 133; [1971] 1 MLJ 202 and *PP v. Mohamad Ramly* [1973] 1 LNS 120; [1974] 1 MLJ 95 this court does not find that the nature of the offence and the manner it was committed, justifies the application of s. 173A(2) of the CPC. There was a failure by the Magistrate to equally consider the need of protecting public interest in such offences. Secretly intruding a woman's privacy and recording images of her in her natural state is no trivial matter. As held by Mohamad Azmi J in *PP v. Mohamd Ramly* (*supra*):

> The main question to be determined in this appeal is whether the present case falls squarely and fairly within the terms of s. 173A(ii)(b) of the Criminal Procedure Code. In my view, the learned magistrate failed to consider sufficiently the serious nature of the offence committed and the deliberate manner in which the crime had been perpetrated. Where the offence committed is not of a trivial nature and it is committed with such degree of deliberateness, a case can rarely come within the ambit of this section. In assessing sentence, a proper balance should be struck between public interest and the interest of the accused. In the present case, it is apparent from the grounds of judgment that the learned magistrate was too preoccupied with the interest of the accused whilst giving no adequate consideration to public interest. The object of punishment is not only to punish the offender but also to deter others.

[32] In *Mohd Fairuz Ahmad v. PP* [2021] 1 LNS 2074; [2021] MLJU 2453, the court held:

> [88] This is not a case of simple peeping offence. There are aggravating factors. There was some degree of planning on the part of the Appellant using handphone to video record the victims' private moments in the toilet and storing them in the Appellant's laptop as Appellant's collections which could be replayed over and over again. There was also a risk of circulation of these images to other third parties. See: *Public Prosecutor v. Jay Beng Guan Albert* [2000] 3 SLR 785 and *Pendakwa Raya lwn Nor Hanizam bin Mohd Noor* [2019] MLJU 638.
>
> [89] Women should have the confidence and feel secured that their private moments will not be observed while using and in the women's public toilet.
>
> [90] For the protection of the public interest, there is a need to impose a custodial sentence upon the Appellant to make clear that the Court abhors such behaviours or would not treat it lightly so as to deter any such behaviours.
>
> [91] A fine would not serve the purpose and would give an impression that such perverse behaviours and conducts for which the Appellant has been convicted of the offence is trivial. A mere fine imposed would also encourage corruption of mind of the would be offender to make-believe that he/she can buy out of such offence when caught.
>
> [92] There is no basis to impose upon the Appellant only a bond of good behaviour under section 173A of the Criminal Procedure Code (Act 593). I do not think any order under the section is appropriate having regards to the nature of the offence committed by the Appellant for the reasons I have given earlier.

Conclusion

[33] For all those reasons, this court is of the view that the Magistrate committed an error in making the order to discharge the respondent under s. 173A(2) of the CPC. The offences committed by the respondent do not fit the purpose of s. 173A(2). The rehabilitative approach taken by the Magistrate must be balanced with a deterrent approach in the particular facts of this appeal. That deterrence must come in the form of a conviction under each of the charge.

Decision

[34] The appeal is hereby allowed. The order of the Magistrate is hereby set aside and is substituted with the following:

(i) the respondent is hereby convicted for the offences committed under s. 509 of the Penal Code under the first and second charge under case number PA-82-19-12-2020;

A (ii) having regard to the mental disorder suffered by the respondent and the need for continued treatment, the respondent is released pursuant to s. 294 of the CPC on a probation of good behaviour under each charge for a period of two years subject to the execution of bond in the amount of RM5,000 with one surety as per the original order of the Magistrate; and

B

(iii) any default of this order by the respondent shall cause the respondent to be sentenced according to sentence originally provided under s. 509 of the PC.

C

D

E

F

G

H

I